

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL No.64 of 1998
in
COMPANY APPLICATION No.263 of 1989

WITH
OJ CIVIL APPLICATIONS Nos.154, 157 & 158 OF 1998
in
OJ APPEAL No.64 of 1998

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For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA
and

MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? YES
2. To be referred to the Reporter or not? YES
3. Whether Their Lordships wish to see the fair copy of the judgement? NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? NO
5. Whether it is to be circulated to the Civil Judge?

NO

DHARMESH CHANDRAKANT PATEL

Versus

O.L. OF SURAT DAIRY CO.LTD.

Appearance:

1. O.J.APPEAL No. 64 of 1998
MR SB VAKIL for appellants.
MR Devang S NANAVATI for Respondent No. 1

2. CIVIL APPLICATION No 154 of 1998
MR SB VAKIL for Petitioners
MR DS NANAVATI for Respondent No. 1

3. OJ CA No.157/ 98
Mr. V.M. Trivedi for the applicants
Mr.S.B. Vakil, for the opponents

4. OJ CA No.158/ 98
Mr.K.K. Trivedi, for the applicants
Mr. S.B. Vakil for the opponents

CORAM : MR.JUSTICE M.R.CALLA and
MISS JUSTICE R.M.DOSHIT
Date of Order: 18/09/98

COMMON ORAL JUDGMENT : (Per M.R. Calla, J.)

Before we proceed to deal with the main Appeal and the Civil Applications moved therein by the appellant, we may deal with Civil Applications Nos.157 and 158 of 1998, which have been moved by the applicants therein for being impleaded as parties or in the alternative to be heard as interveners. We find that the applicants herein are prospective buyers. so far as the subject matter of the appeal is concerned, the appellants seek to agitate their rights based on an agreement which was entered into by the appellants with the company in question, way back in the year 1981. The applicants herein may have a right to offer their bids as and when the property of the company is subjected to sale. We find that the applicants in these two CAs have no direct lis with the appellants herein and the learned Company Judge has also observed in the impugned order that they have no locus standi and that they can make their offers as and when the property of the company is subjected to sale.

2. In this view of the matter we do not find that the applicants herein are either necessary or proper parties. Whereas they have nothing to do with the agreement which had been entered into by the appellants with the company in 1981 and the appellants in this appeal seek to agitate their right based on that agreement, these applicants are not required to be entertained even as interveners. We, therefore, do not find any force in these two Civil Applications, 157 of 1998 and 158 of 1998 and both these applications are, therefore, rejected at the very threshold.

3. So far as the main appeal is concerned, learned counsel for the appellants has challenged the impugned order dated 12.8.1998 on the ground that the appellants had entered into agreement with the company on 14.4.1981 and the company had agreed to sell to the applicants, the land in question at the rate of Rs.54 per sq. yard as per the Satakat agreement dated 14.4.1981 in pursuance of resolution passed by the company on 8.3.1975. Company Application No.262 of 1989 was moved on 15.12.1989 in pending Company Application No.559 of 1983. The appellants came with the case that the land was subjected to litigation and it could not be sold because of the provisions of the Urban Land (Ceiling and Regulation) Act, 1976 ("the Act" for brevity) and the sale of the land in question was to be effected after obtaining necessary permission of this Court due to the fact that it is a holding company, namely, Gujarat Investment Trust Limited which had been ordered to be wound up in 1976. It is further alleged that the company had received notice with respect to the proceedings which commenced for acquisition of the said land under the provisions of the Act. A direction has also been sought about the deposit of the amount of sale consideration as deemed just and equitable. The respondent company was ordered to be wound up by the order dated 30.9.1983. The present appellant requiring the transfer of the property in question under the agreement to sell is also ready to pay the consideration at the market value as may be determined by the Court. It appears that after the winding up of the company, Valuer's report was called for on behalf of the appellants herein. It is also stated before the learned Company Judge that fresh valuation report may be obtained for the purpose of ascertaining the market value of the property in question. As per the valuer's report the land could be sold out at the rate of Rs.1300/- per sq. meter. But it appears that the applications had been moved in this pending company matter that such applicants were prepared to offer consideration for the property in question at the rate of Rs.3200/- per sq. meter backed by deposit of the amount as part payment or full payment as may be directed by the Court. It further appears that in order to test the bona fides of such applicants the Court had directed them to deposit 50 per cent of the total amount and the two applicants who had made offer at the rate of Rs.3200/per sq. meter had also deposited a sum of Rs.55 lakhs each and such deposit continues till today.

4. The contest put up by the appellants is that the present appellants have a pre existing right and interest to purchase this land on the basis of the agreement dated

14.4.1981. Therefore, they should be given this land on the market value which may be assessed by the court and this offer has been made without prejudice to their rights because according to them on facts and in law they are entitled to get the land in question at the rate as per the agreement to sell, i.e. at the rate of Rs.54 per sq. yard, which had been agreed in 1981. It requires no mention that although agreement is of 14.4.1981, no steps were taken for enforcement of this agreement at any point of time - even till date when the company was wound up by order dated 30th September 1983 and even thereafter for many years until 1989 when the Company Application No.263 of 1989 was moved in the pending Company Petition No.59 of 1983.

5. It has to be agreed on all hands that under sec.54 of the Transfer of the Properties Act mere agreement to sell does not create any interest in the property. Therefore, on the basis of the agreement dated 14.4.1981 the appellants cannot claim the disposition of the property in question to them in terms of the agreement in the present proceedings and further that the company has already been wound up way back in 1983 and the Official Liquidator has already been appointed.

6. It is settled law that once the company has been wound up by the order of the Court and the Official Liquidator has been appointed, the matters have to be considered for the purpose of disposition of the property on the basis of the provisions contained in the Companies Act and the relevant rules made thereunder. The learned counsel for the appellant has argued with reference to the provisions of sec.448 and 457 of the Companies Act relating to the appointment and powers of the liquidator and it was submitted that the learned Company Judge has wrongly preferred to invoke sec.536(2) of the Companies Act. True it is that the Official Liquidator is appointed under sec.448 and the powers of the Liquidator have been laid down under sec.457, it is also clear from the language of sec.457 that the Liquidator in a winding up by the Court shall exercise such powers subject to sanction of the court to sell immovable and movable property and actionable claims of the company by public auction or private contract, with power to transfer the whole thereof to any person or body corporate, or to sell the same in parcels. Thus, the sanction of the court in such cases is clearly required and the same is a statutory requirement under sec.457. Learned counsel for the appellant has tried to distinguish the cases with regard to the pre existing obligations of the company in relation to the property with reference to third parties

and the requirements to raise funds out of the property of the company in which there is no interest of third parties on the basis of any pre existing agreement. According to the learned counsel for the appellants while dealing with such rights of the parties, who had entered into the agreement with the companies before winding up, such rights of such parties cannot be decided on the consideration of raising funds for discharging liabilities or to meet other actionable claims. It has been further contended that while dealing with the case of parties like the present appellants, who press their claims based on pre existing agreement, the consideration to raise as much funds as possible in keeping with the interest of the unsecured creditors, etc. are not the considerations which can be said to be germane. Therefore, even if the sanction is required by the court under sec.457, there is no question of invoking sec.536(2) for avoidance of transfers after the commencement of the winding up and therefore, sec.536(2) cannot put any fetter against exercise of the power by the liquidator under sec.457.

7. We have considered the aforesaid contentions raised by the appellant and we find that the provisions on which reliance has been placed cannot be read in isolation or to the exclusion of one another. These provisions are not mutually exclusive. Even if the liquidator exercises its powers under sec.457, it has to adhere to other relevant provisions under the Companies Act. It is certainly the case of disposition of the property and such disposition cannot be undertaken by the Official Liquidator by excluding the provisions of sec.536(2). The appellants herein had not filed any civil suit for specific performance of the contract on the basis of the agreement dated 14.4.1981. They are now seeking purchase of the property in question on the basis of that agreement dated 14.4.1981 and for that purpose even if they are prepared to pay the market value (which according to them is by way of concession) instead of rates agreed in 1981, they are certainly seeking an exclusive right to purchase properties in question in preference because of the agreement. Once winding up orders are passed and the Official Liquidator is appointed and any property of such company is to be sold out for any purpose whatsoever it is the case of disposition of property and it cannot be undertaken in violation of sec.536(2) and for the purpose of meeting the liabilities and other obligations of the company; the Official Liquidator, who functions subject to the sanctions by the court has to conform to the relevant provisions under the Companies Act. There is no scope to

agree with the contentions of the appellants that the endeavour to raise maximum possible funds cannot be a relevant consideration even with the court in such cases. In our opinion it has been rightly held by the learned Company Judge that winding up of the company by the court is to facilitate the protection and optimum realisation of assets with a view to ensure equitable distribution thereof amongst all types of claimants and no distinction can therefore be made in the case of an obligation to fulfil the pre existing agreement. The Official Liquidator in fact discharges his obligation as a trustee in the best interest of realising said object and he is under an obligation to realise maximum possible price for assets of the company to ensure the most equitable distribution of the company's assets as available on the institution of winding up proceedings and to discharge the company's liabilities to maximum possible extent. The interest of unsecured creditors is also to be kept in mind and the same is not to be prejudiced by creating class amongst class of creditors and any party having claims based on pre existing agreements. In case the property is ordered to be transferred in favour of the party on the basis of pre existing agreement only by placing reliance on the opinion of expert and by ignoring positive material about the market price available before the court in the very same proceedings, it would defeat the basic consideration which is germane. After all, the valuation report is only the opinion of an expert with regard to estimated price which the property may fetch, if sold in the open market. But this expert opinion cannot be ultimate, when it comes on record by way of positive evidence before the court that it could fetch much more price in the open market in comparison to what had been opined by the valuer as an expert. The opinion given by the expert cannot be said to be binding on a court as conclusive or sole guiding factor when the court finds that there are more than one parties ready to pay the price much higher than mentioned in the report of valuer based on estimates. The learned Company Judge has rightly observed that the objective of realising best price can only be achieved by putting the property to public sale either by putting it to auction or inviting sealed offers. When it is proved as a positive fact before the court that the price estimated by the valuer is wholly inadequate, the Court is not supposed to ignore the fact and yet act upon the Valuer's report. In the facts of the present case it was established before the Company Judge that in face of the price assessed and estimated by the valuer at the rate of Rs.1300/- per sq. meter there were more than one applicants to offer at the rate of Rs.3200/- per sq. meter which was nearly two and

half times the price assessed by the valuer. By ignoring this aspect of the matter if the property of the company is sold out on the basis of the valuer's report to a party which had entered into the agreement way back in 1981, and that too at this stage when the company had already been wound up in 1983, it would certainly mean to recognise a precedence to preferential right in favour of that party which had only entered into an agreement to sell - when it is clearly discernible from the provisions of sec.54 of the Transfer of Properties Act that an agreement to sell does not create any interest in the property. Therefore, it cannot be said that the agreement to sell which was entered into in 1981 had created any interest as such in the property of the company so far as the appellants are concerned and if at all the appellants are interested in the property of the company, now they have to compete in open market along with other applicants and merely because of the agreement to sell of 1981 which the party itself failed to enforce for the reasons good, bad or worse, it cannot seek such a preference or an exclusive right to purchase by offering market rate as per the valuer's report. To give recognition to such preferential right would certainly mean to recognise preferential right which has no sanction of law and it would also operate to the great prejudice in the matters of discharge of obligations of the company at the stage when the company has already been wound up. For the reasons aforesaid we do not find any substance in this contention raised on behalf of the appellants so as to assail the findings of the learned Company Judge. In this regard Shri Devang S. Nanavati on behalf of Official Liquidator has placed reliance on a decision of the Bombay High Court in Kanchan Kumar Dhar, Official Liquidator v. Dr. LM Visarai and others, 1986 Company Cases 746 from which the principle is clearly made out that transaction must be in the interest of the company's business or in the interest of the company under liquidation or its creditors. Accordingly while taking up the question of disposition of property the discretion must be exercised by the court showing concern for the unsecured creditors. In (1991) Butterworths Company Law Cases 468 it has been propounded as a well settled point of practice in company courts that validation orders (as they are called) are only made in respect of the companies where the court is satisfied by credible evidence as to one or other of two factual conclusions and that the court must be satisfied that particular transaction (usually the sale of a substantial asset) is beneficial to creditors, because it produces an advantageous price or some such benefit which are likely to be profitable and therefore will increase the

company's assets to be beneficial to the creditors. In this decision the court has clearly expressed that it must be understood by the people making applications to the court that the court must be satisfied that the order will be for the benefit of all the company's creditors or that the proposed transactions are likely to benefit all creditors. It is not an adequate basis for an application for a validation order to say that one or two creditors who may be the petitioning or a supporting creditor, who are parties to the petition and who naturally want to be paid at once, consent to the making of such an order. The conclusion is that in considering whether to make a validating order the court must always do its best to ensure that the interests of the unsecured creditors will not be prejudiced. In our considered opinion the view taken by the learned Company Judge is in absolute conformity with this settled principles of law while dealing with the applications of this nature. Therefore, there is no scope for sustaining the arguments raised on behalf of the appellants. Reliance was also placed on by Shri D.S. Nanavati, learned advocate on behalf of the Official Liquidator on a decision of the Supreme Court in N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao and others, (1995) 5 SCC 115. In this case the Apex Court has considered provisions of sec.16(c) of Specific Relief Act, 1963 and as to what should be considerations for the purpose of grant or refusal of specific relief. Whereas we have already found that the Company Judge has passed order on the basis of considerations which were germane and which should have weighed while passing such order with the Company Judge, it is not necessary for us to go into the question as to whether there was any readiness and willingness on the part of the appellants for the purpose of enforcement of agreement dt.14.4.1981. The appellants' right for the purpose of seeking precedence in the matter of purchase of company's property cannot be accepted even if it is found that it was ready and willing. Even if this question of readiness and willingness is assumed in favour of the appellants, we do not find any lawful justification to accept their exclusive claim of preference as against the actual market value and there is no reason to avoid competitive rates in the market merely because of the agreement to sell, which does not confer any right nor the liquidator functioning under orders of the court under the Companies Act is expected to enforce the question of specific relief brushing aside the relevant provisions under the Companies Act.

8. Learned counsel for the appellant has laid much stress on the Court's orders dated 12.9.1990 and 9.4.1992

annexed to the Appeal as Annexures 'A' and 'B' respectively. It is submitted that in these orders the relief was granted and the Official Liquidator was directed to execute the sale deed for the property mentioned in the Banakat dated 15th June 1981, after receipt of the sale consideration at the rate of Rs.150/per sq. mtr. for 47 % share of the company in liquidation. By order dated 9.4.1992, the relief as aforesaid which was granted on 12.9.1990 was declined to be modified and the application moved for that purpose had been rejected. We find from reading both these orders that even while passing these orders the Court had acted on the consideration that the interest of the creditors is paramount and on the basis of material which was available before the court at that time the court had found that the rate of Rs.150/- per sq. mtr was the maximum price which could be fetched. There was no material before the court other than the valuation report. It also appears that the matter had not been contested by the Official Liquidator at the time when the order dated 12.9.1990 was passed and rightly so because the rate of Rs.150/- per sq. mtr. was considered by the court at that time to be the maximum price which could be realised. Merely because the price was reached on the basis of valuation report in absence of any other material to show that the market value could be much more, it cannot be said that any principle was laid down by the court that the price estimated in the valuation report must be acted upon and adhered to by the court in every case - notwithstanding the other positive material on record to show that in the open market, the same property could fetch much higher price than what is estimated in the valuation report. We find that the principles on the basis of which the order dated 12.9.1990 was passed is the same as has been applied by the learned Company Judge while passing the impugned order. Therefore, merely because in 1990 an order was passed to execute sale deed at the price assessed by the valuer it cannot be said that any principle of universal application has been laid down to accept the estimated price under the valuer's report notwithstanding the positive material available on record before the court in the form of offers through application and the subsequent deposits by such offerers to meet the test of bona fides.

9. The learned counsel for the appellants while making reference to a decision of the Apex Court in *Shanta Genevieve Pommerat & another v. Sakal Papers Pvt. Ltd & another*, AIR 1983 SC 269, also submitted that such appeals cannot be dismissed in limine and they have to be admitted as a matter of course. We find that the

case in which the Honourable Supreme Court made the above observations was a case in which the Company Petition was filed under sec.397 and 398 of the Companies Act, for relief against oppression and mismanagement and the aforesaid observations were made in the context of relevant rules. So far as the facts of the present case are concerned, the Official Liquidator who is contesting respondent in the facts of the case has already appeared before the Court and therefore, it would have been an empty formality only to admit the case and then decide it finally. Whereas the contesting party has appeared it cannot be said to be a case of dismissing the appeal without notice to the other side or in limine. Therefore, we did not consider it necessary to admit the appeal and then proceed for final hearing and whereas after hearing both the sides we are satisfied that there is no substance in the appeal, the same is hereby dismissed.

10. Civil Application No.154 of 1998 is with regard to stay. In view of the order passed as above dismissing the Appeal, no orders are required to be passed in Civil Application No.154 of 1998 and the same is accordingly disposed of.

11. Civil Applications Nos.157/98 and 158/98 also stand disposed of as mentioned in paragraphs nos.1 and 2 above.

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